

**MAINTENANCE AGREEMENT  
99W at Main Street Gateway Treatments  
City of Tigard**

THIS AGREEMENT is made and entered into by and between the STATE OF OREGON, acting by and through its Department of Transportation, hereinafter referred to as "ODOT;" and the City of Tigard, acting through its elected officials, hereinafter referred to as "City," both herein referred to individually or collectively as "Party" or "Parties."

**RECITALS**

1. Pacific West Highway, also known as OR 99W, is a part of the state highway system under the jurisdiction and control of the Oregon Transportation Commission (OTC). SW Main Street is a part of the city street system under the jurisdiction of City.
2. By the authority granted in Oregon Revised Statutes (ORS) 190.110, state agencies may enter into agreements with units of local government for the performance of any or all functions and activities that a Party to the agreement, its officers, or agents have the authority to perform.
3. City is constructing gateway improvements on both ends of SW Main Street and making improvements on the Fanno Creek Trail underneath the 99W bridge structure. The improvements and lighting will touch and affect 99W and will require continued maintenance work after construction and installation is complete.

**NOW THEREFORE**, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

**TERMS OF AGREEMENT**

1. Under such authority, ODOT and City agree to City's construction of gateway improvements on SW Main Street at the north and south intersections of 99W, and City's replacement of the pavement trail with an eight (8) foot wide concrete pathway and lighting along the Fanno Creek Trail underneath the 99W bridge structure from Main Street to George Morlan Plumbing hereinafter referred to as "Project." The gateway improvements shall include trees and other plantings, irrigation facilities, entry signs, lighting, and artwork or gateway features. The Parties agree to abide by the maintenance responsibilities for the landscape improvements made on 99W and the intersection of SW Main Street and the maintenance responsibilities associated with the reconstruction of the trail underneath 99W from SW Main Street to George Morlan Plumbing. The location of the area described in this Agreement is approximately as shown on the sketch map attached hereto, marked Exhibit A, and by this reference made a part hereof.
2. City shall be responsible for all construction, maintenance, water, and electrical costs for the Project.

3. This Agreement shall become effective on the date all required signatures are obtained and shall remain in effect for the purpose of ongoing maintenance responsibilities for the useful life of the facilities constructed as part of the Project or until ODOT requires the right of way for roadway purposes. The useful life is defined as twenty (20) calendar years. The Project shall be completed within five (5) calendar years following the date of final execution of this Agreement by both Parties.

## **CITY OBLIGATIONS**

1. Upon obtaining a permit to "Occupy or Perform Operations upon a ODOT Highway" from assigned ODOT District 2B Project Manager, the City shall, at no cost to ODOT, be responsible for construction, maintenance, any necessary replacement, electrical costs, and water for any landscape improvements, art, or gateway features constructed on both ends of SW Main Street at the intersection of 99W, and for the replacement of the asphalt trail and lighting installed underneath the 99W bridge from SW Main Street to George Morlan Plumbing building location within the Project limits on ODOT right of way. City shall submit a list of all plantings City intends to be planted for the Project for ODOT approval.
2. City agrees to comply with all provisions of ODOT issued permits and shall require its contractors, subcontractors, or consultants performing work on the Project within state right of way to comply with such provisions.
3. City shall, upon ODOT's written review and concurrence of final plans, prepare the contract and bidding documents, advertise for construction bid proposals, award all contracts, pay all contractor costs, furnish all construction engineering, field testing of materials, technical inspection, and Project manager services for administration of the contract.
4. The Project shall be maintained at the same level of service as are similar City facilities, with the following exceptions as applicable to the Project:
  - a. To meet the sight distance needs on OR 99W the following shall be maintained as follows: roadside vegetation shall be no higher than eighteen (18) inches; there shall be few obstructions in the clear zone; and vegetation shall not impede traffic movement and operation along the Highways.
  - b. Maintenance of landscape shall include replacement of dead or dying plants and trees, removal of litter, removal of weeds or weed control, removal of plants ODOT has determined to be target weed or invasive species, and tree trimming to maintain a seventeen (17) foot clear zone in the travel lane, leaf removal, mulching, and irrigation for healthy sustainability of plantings.

- c. To ensure safety of the traveling public, the trees planted and maintained by City within the Project boundaries shall not block, impede or unreasonably limit the peripheral vantage point of the driving public.
5. City will maintain, at no cost to ODOT, the Fanno Creek Trail that runs on ODOT right of way at the same level of service as the rest of the trail. This includes sweeping, signage, plant pruning and lighting.
6. City shall, at no cost to ODOT, be responsible for 100 percent of maintenance, water, and electrical costs associated with the Project. City shall ensure that the water and power companies send water and electrical bills directly to City. All water and electrical systems necessary to maintain the Project shall be separate from ODOT systems.
7. Illumination Maintenance shall meet ODOT's current illumination policy, available through the District 2B or Region 1 Traffic section. Illumination installation shall meet current ODOT standards of construction practice and current illumination policy.
8. City shall be responsible for 100 percent of any maintenance and electrical energy costs associated with the lighting installed as a part of the City illumination plan for the Project. City shall request that the power company shall send power bills directly to City.
9. City certifies that no right of way acquisition for the state highway is required for this Project.
10. City shall comply with all federal, state, and local laws, regulations, executive orders and, ordinances applicable to the work under this Agreement, including, without limitation, the provisions of ORS 279C.505, 279C.515, 279C.520, 279C.530 and 279B.270 incorporated herein by reference and made a part hereof. Without limiting the generality of the foregoing, City expressly agrees to comply with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations.
11. City shall construct the Project in accordance with the requirements of ORS 276.071 including the public contracting laws within ORS Chapters 279A, 279B, and 279C.
12. If City chooses to assign its contracting responsibilities to a consultant or contractor, City shall inform the consultant or contractor of the requirements of ORS 276.071, to ensure that the public contracting laws within ORS Chapters 279A, 279B, and 279C are followed.
13. City shall, without expense to ODOT, take all steps necessary to effectively protect the adjacent ODOT transportation facilities from any damage or incident from City

activities within the Project area. City shall be liable to and shall reimburse ODOT for any damage to ODOT's facilities resulting from or reasonably attributed to City's installation, repair, or landscape maintenance for the Project.

14. City shall perform the service under this Agreement as an independent contractor and shall be exclusively responsible for all costs and expenses related to its employment of individuals to perform the work under this Agreement, including, but not limited to, retirement contributions, workers compensation, unemployment taxes, and state and federal income tax withholdings. Nothing herein is intended, nor shall it be construed, to create between the Parties any relationship of principal and agent, partnership, joint venture or any similar relationship, and each Party hereby specifically disclaims any such relationship.
15. All employers, including City, that employ subject workers who work under this Agreement in the ODOT of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Employers Liability insurance with coverage limits of not less than \$500,000 must be included. City shall ensure that each of its contractors complies with these requirements.
16. City shall require its contractor(s) and subcontractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the ODOT of Oregon, Oregon Transportation Commission and its members, Department of Transportation and its officers, employees and agents from and against any and all claims, actions, liabilities, damages, losses, or expenses, including attorneys' fees, arising from a tort, as now or hereafter defined in ORS 30.260, caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of City's contractor or any of the officers, agents, employees or subcontractors of the contractor ("Claims"). It is the specific intention of the Parties that ODOT shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the ODOT, be indemnified by the contractor and subcontractor from and against any and all Claims.
17. Any such indemnification shall also provide that neither City's contractor and subcontractor nor any attorney engaged by City's contractor and subcontractor shall defend any claim in the name of the ODOT of Oregon or any agency of the ODOT of Oregon, nor purport to act as legal representative of the ODOT of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The ODOT of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that City's contractor is prohibited from defending the ODOT of Oregon, or that City's contractor is not adequately defending the ODOT of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the ODOT of Oregon to do so. The ODOT of Oregon reserves all rights to pursue claims it may have against City's contractor if the ODOT of Oregon elects to assume its own defense.

18. City acknowledges and agrees that ODOT, the Oregon Secretary of ODOT's Office, the federal government, and their duly authorized representatives shall have access to the books, documents, papers, and records of City which are directly pertinent to the specific Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of six (6) years after final payment (or completion of Project -- if applicable.) Copies of applicable records shall be made available upon request. Payment for costs of copies is reimbursable by ODOT.
19. If City enters into a construction contract for performance of work on the Project, then City will require its contractor to provide the following:
- a. Contractor shall indemnify, defend and hold harmless ODOT from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, subcontractors, or agents under the resulting contract.
  - b. Contractor and City shall name ODOT as a third party beneficiary of the resulting contract.
  - c. Commercial General Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the resulting contract, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to ODOT. This insurance will include personal and advertising injury liability, products and completed operations. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Coverage will be written on an occurrence basis. If written in conjunction with Automobile Liability the combined single limit per occurrence will not be less than \$ 1,000,000 for each job site or location. Each annual aggregate limit will not be less than \$ 2,000,000.
  - d. Automobile Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the resulting contract, Commercial Business Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits). Combined single limit per occurrence will not be less than \$1,000,000.
  - e. Additional Insured. The liability insurance coverage, except Professional Liability, Errors and Omissions, or Workers' Compensation, if included, required for performance of the resulting contract will include ODOT and its divisions, officers and employees as Additional Insured but only with respect to Contractor's activities to be performed under the resulting contract. Coverage will be primary and non-contributory with any other insurance and self-insurance.
  - f. Notice of Cancellation or Change. There shall be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance

coverage(s) without thirty (30) days written notice from Contractor's or its insurer(s) to ODOT. Any failure to comply with the reporting provisions of this clause will constitute a material breach of the resulting contract and will be grounds for immediate termination of the resulting contract and this Agreement.

20. City certifies, at the time this Agreement is executed, that sufficient funds are available and authorized for expenditure to finance costs of this Agreement within City's current appropriation or limitation of current biennial budget.
21. City certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of City, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind City.
22. City's contact person for all notifications regarding this Agreement is Kim McMillan, 13125 SW Hall Blvd., Tigard, OR 97223, 503-718-2642, kim@tigard-or.gov, or assigned designee upon individual's absence. City shall notify the other Party in writing of any contact information changes during the term of this Agreement.

#### **ODOT OBLIGATIONS**

1. ODOT hereby grants City and its contractors the right to enter onto and occupy ODOT right of way upon issuance of ODOT-required permits for the performance of necessary preliminary engineering, construction, and maintenance of the Project.
2. ODOT's District 2B Project Manager, or designee, shall issue the required permits and, at Project expense, review and concur with any proposed landscaping activities within the Project area.
3. ODOT shall, without expense to City, take all steps necessary to effectively protect the adjacent City landscape facilities from any damage or incident from ODOT activities within the Project area. ODOT shall be liable to and shall reimburse City for any damage to City's facilities resulting from or attributed to ODOT activities in the Project area.
4. ODOT shall continue to provide ongoing roadway maintenance on 99W from face of curb to face of curb within Project area identified in Exhibit A.
5. ODOT's Project Manager for this Project is Michael Strauch, 9200 SE Lawnfield Rd., Clackamas, OR 97015, 971-673-6200, michael.l.strauch@odot.state.or.us, or assigned designee upon individual's absence. ODOT shall notify the other Party in writing of any contact information changes during the term of this Agreement.

#### **GENERAL PROVISIONS**

1. This Agreement may be terminated by mutual written consent of both Parties.

2. ODOT may terminate this Agreement effective upon delivery of written notice to City, or at such later date as may be established by ODOT, under any of the following conditions:
  - a. If City fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
  - b. If City fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from ODOT fails to correct such failures within ten (10) days or such longer period as ODOT may authorize.
  - c. If City fails to provide payment of its share of the cost of the Project.
  - d. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or ODOT is prohibited from paying for such work from the planned funding source.
3. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
4. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against ODOT or City with respect to which the other Party may have liability, the notified Party must promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.
5. With respect to a Third Party Claim for which ODOT is jointly liable with City (or would be if joined in the Third Party Claim), ODOT shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by City in such proportion as is appropriate to reflect the relative fault of ODOT on the one hand and of City on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of ODOT on the one hand and of City on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. ODOT's contribution amount in any instance is capped to the

same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if ODOT had sole liability in the proceeding.

6. With respect to a Third Party Claim for which City is jointly liable with ODOT (or would be if joined in the Third Party Claim), City shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by ODOT in such proportion as is appropriate to reflect the relative fault of City on the one hand and of ODOT on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of City on the one hand and of ODOT on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. City's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.
7. The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.
8. If City fails to maintain facilities in accordance with the terms of this Agreement, ODOT, at its option, may maintain the facility and bill City, seek an injunction to enforce the duties and obligations of this Agreement or take any other action allowed by law.
9. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
10. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of ODOT to enforce any provision of this Agreement shall not constitute a waiver by ODOT of that or any other provision.

**THE PARTIES**, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

**CITY OF TIGARD**, by and through its  
elected officials

By \_\_\_\_\_  
Mayor

Date \_\_\_\_\_

**APPROVED AS TO LEGAL  
SUFFICIENCY**

By \_\_\_\_\_  
Counsel

Date \_\_\_\_\_

**City Contact:**

Kim McMillan  
13125 SW Hall Blvd.  
Tigard, OR 97223  
503-718-2643  
kim@tigard-or.gov

**STATE OF OREGON**, by and through  
its Department of Transportation

By \_\_\_\_\_  
Region 1 Manager

Date \_\_\_\_\_

**APPROVAL RECOMMENDED**

By \_\_\_\_\_  
District 2B Manager

Date \_\_\_\_\_

**ODOT Contact:**

Michael Strauch  
9200 SE Lawnfield Rd.  
Clackamas, OR 97015  
971-673-6200  
michael.l.strauch@odot.state.or.us

## EXHIBIT A PROJECT LOCATION

